the right and title of her grantor. She had no occasion to purchase what already belonged to her, nor is it to be supposed that there was any design by her to do so. Her grantor had already acknowledged and submitted to her superior claim. The reasonable presumption is that she paid for the premises, deducting from the price for the entire premises the value of what was already her own. It would seem hard and inequitable that the mere form of the instrument of conveyance should have the effect to deprive her of a valuable interest and right which she already possessed. Such a result was undoubtedly never dreamed of by the parties concerned when the conveyance was made. Nor does the law require it to be so. We are aware that there have been contrary decisions upon the point presented. Nor is there a satisfactory consistency upon it in the decisions of our own state. But we regard the opinion in the leading and important case of *Foster* v. *Dwinel*, 49 Maine 44, as a settlement of the question so far as the rights of this tenant are concerned. That case has been much commended by several text-writers since it was promulgated, and believing that the arguments and conclusions of the court therein are based upon sound logic and good sense, we see no good reason why it should not be adhered to in a state of facts like those presented in the present case: Bigelow on Estoppel 71; 2 Scribner on Dower 227.

Judgment for demandant for her dower in two-thirds of the premises described in the writ.

APPLETON, C. J., WALTON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

Circuit Court of the City of Richmond, Virginia.

W. B. DUNCAN AND P. C. CALHOUN, TRUSTEES, *v.* CHESAPEAKE & OHIO RAILROAD CO. ET ALS.

Employees of a defaulting railroad company are not to be considered as creditors at large of the company in regard to their claims for wages in arrears at the time of the appointment of a receiver for the company.

When mortgagees come into a court of equity seeking satisfaction of their claims against a railroad company by suit for foreclosure, they should be required to satisfy all arrearages of pay due employees out of the trust property or its future earnings.

THIS was a cause in equity, which came up on motion and was heard at the February Term 1876 of the Circuit Court of the City

of Richmond, on the report of the Hon. W. C. Wickham, receiver, asking the instructions of the court as to the disposition of the surplus earnings of the railroad, and requesting to be allowed to discharge the arrears of pay due employees prior to his appointment as receiver.

W. J. Robertson, *H. T. Wickham* and *W. H. Hogeman*, for receiver, in support of the motion.

James Lyons and *J. A. Jones*, contrà.

Shipman and *Barlow*, *Larocque & MacFarland*, of New York, for complainants, assented to the motion.

WELLFORD, Circuit Judge.—Under orders heretofore entered in this cause, the court, in the interest of the creditors, has assumed control and administration through its receiver of all the franchises and property of the Chesapeake and Ohio Railroad Company. That company was successor to the Virginia Central Railroad Company, and in succeeding to all its franchises and rights of property, assumed all of its outstanding obligations.

It is admitted that these franchises and property thus acquired *cum onere*, are abundantly sufficient to satisfy the creditors of the Virginia Central Railroad Company, and their claims are conceded to be paramount to those of any claimants under obligations of the Chesapeake and Ohio Railroad Company.

There appears to be no doubt that their claims will be paid to the full extent of principal and interest out of the property now under the control of the court.

These creditors have patiently forborne to press their rights, and being now entitled to payment of arrears of several instalments of interest, and some of them to payment of principal, may properly expect every reasonable consideration in the disbursement of any funds subject to the order of the court, as far as may be practicable, towards the satisfaction of their claims. But, unhappily for all parties to this cause, the immediate satisfaction of the most meritorious claims is altogether impracticable. My province is simply to determine how far it is practicable under the circumstances, and so far, to order that it shall be made.

The creditors of the Virginia Central Railroad Company, as well as all the creditors of the Chesapeake and Ohio Railroad Com-

pany, who are practically interested just now in any orders of this court, claim under obligations of those companies secured by several deeds of trust executed by the respective companies, conveying in very comprehensive terms all corporate franchises and rights of property. These deeds were frequently in common parlance and are sometimes in these proceedings styled mortgages, and I shall accept the phraseology, notwithstanding its inaccuracy.

It was a substantial part of all these mortgages that the custody, control and administration of the trust property should be left undisturbed in the hands of the railroad company, not merely until default in the terms of their covenants, but thereafter, until, in the intelligent discretion of the trustees, or upon the command of a large fractional representation of the bondholders, or in the judgment of a court of competent jurisdiction, such custody should be changed.

The character of the security offered for the investments asked by the corporation in placing its bonds upon the market, made this provision of the mortgages a most essential element of the contract. Each mortgage contemplated an indefinite number of *cestuis que trust*, varying in amount of interest and subject as to persons and amount to all the fluctuations of the money market. The security tendered was not to be measured in its value by the probable result of any every-day sale under the hammer of the auctioneer. The great value of the security consisted in the importance of the franchise and the providence with which the money contributed for its development should be appropriated to the construction of a great inter-state highway, the accumulation of all necessary material for transportation of persons and property, and an economical and energetic prosecution of the work. The corporation was engaged in a great experiment, and upon the success of that experiment necessarily depended, to a great extent, the value of all its obligations. But it was a corporation based upon solid and substantial investments, to which millions of money had been contributed by the Commonwealth and several of the counties of Virginia and many individual citizens of Virginia and her sister states.

The value of all this investment of capital was at stake, and made subordinate by the mortgages to the value of the bonds. The guarantee of the intelligent and watchful self-interest of the stockholders, to ensure the success of the experiment, was therefore no inconsiderable element in the security of the bondholder.

It was not unreasonable to suppose that they would see to it that the administration of the road would be confided to officers of intelligence, capacity and providence, and that those officers, selected by the stockholders to protect their interests, would be not unsafe protectors of the paramount interest of the bondholders. The laws of the Commonwealth required the periodical selection of these officers, gave to every stockholder a voice in such selection, and measured the value of his voice in proportion to the value of his interest by a prescribed rule. But after their election, during their continuance in office in the interest of the great mass of the stockholders, the law protected them in the intelligent discharge of their responsible trusts from the interference of any inconsiderable fraction of the individual stockholders. It was in like manner, in all these mortgages, deemed necessary, in the interest of the great mass of the bondholders, to protect these officers against unnecessary and improvident interruption by a few impatient or capricious bondholders. For the protection of the bondholders, gentlemen of intelligence, position and character were designated in each mortgage as trustees, and large powers, to be exercised in their discretion for the benefit of the *cestuis que trust*, were conferred upon them. But that discretion was not left unlimited. Equally in the interest of the company as in that of the mass of the beneficiaries, the power to require the trustees, after default of the company, to enforce the trust, was studiously withheld from any single beneficiary or any inconsiderable number of the beneficiaries. Power was conferred upon the trustees in some of the deeds to act after default according to their own discretion to the extent of selling the trust property; but no such sale could be made without advertisement for such length of time in advance as would give full opportunity to any and all parties in interest to invoke the interference of a court of equity, and enforce the execution of the trust in subordination to its decrees.

In none of the deeds, however, was power given to the trustees, in advance of sale, to divest the control of the officers of the company at their own independent election. Such power was given in several of the deeds, certainly in that under which the complainants claim, but only in the contingency that the trustees should be so required by a prescribed number in interest of the beneficiaries.

Until the administration of the trust property was assumed by this court through its receiver, none of the trustees, in the exercise

of their discretion or in obedience to the command of the requisite number of *cestuis que trust*, ever suggested, in the discharge of their trust, the propriety of dispossessing the constituted officers of the company. The receiver of this court, under the orders of this court, acquired possession of the trust property only from those constituted officers.

All of these martgages, it will be observed, invited the investment of capital upon faith in the security of an uncompleted railroad, and every purchase of a bond involved upon the part of the purchaser a like confidence, to a certain extent, with that which the state in conferring the franchise, and the stockholder in investing his money, reposed in the executive officers of the company for the faithful and energetic discharge of the duties assigned to them by the fundamental law of the corporation. That duty involved the prosecution to a successful completion of the projected railroad, and as rapidly as it could be completed even partially, the administration and conduct of any completed parts as common carriers of persons and property, under all the obligations as such to the state and the public. In consideration of their paramount interest, the bondholders were invited to confide, and by their acceptance did confide, to the stockholders the selection of these officers, until, after default of the company, they might elect to enforce the trusts of the deeds.

In the meantime these officers, in the common interest of stockholder and bondholder, were charged with their grave responsibilities. To meet them, the subscriptions of stock having been exhausted, they could have in contemplation of all parties no possible means except the earnings of the road and the credit of the company, so far as it might with recorded notice of the liens of the bondholders be at all available.

Prior to any default of the campany in the payment of interest upon the bonds, it was not unreasonable to suppose that the credit of the company might be available with its officers for this purpose. But immediately upon default, publicity of the embarrassment of its finances was unavoidable, and after that default had continued a few months the company became simply a tenant at the will of the bondholders of all its corporate franchises and property. Thereafter the credit of the company could certainly not have been contemplated as adequate to the necessities of the officers

in charge in maintaining and preserving the value of the trust property.

What, then, had they to rely upon? Under the letter of the contract, upon nothing but the earnings of the road so long as it might be permitted to remain in their hands. But it certainly ought to have been contemplated, in making the contract, that this might prove to be an insufficient reliance. The earnings of the road were necessarily subject to the vicissitudes of trade and travel, and dependent upon the continued preservation, in despite of all accidents, of the continuity of its road and the regularity of its trains, and upon the confidence of the public in the providence and watchfulness of the officers charged with the control and management of the road in insuring all necessary and available safeguards against accident to life, limb or property.

That providence and watchfulness necessarily required the continual outlay of large sums of money in daily expenditures for purchase of material of every description and provision for anticipated emergencies all along its four hundred and twenty miles of track. It imposed the necessity of the employment of a small army of subordinates all along its roadway and in control of every moving train, to be controlled and directed by skilled and intelligent overseers. The laws of humanity, the police laws of two states, overriding all questions of pecuniary interest in stockholders or bondholders, forbade the relaxation of that providence and vigilance, whatever it might cost, for one instant of time.

These necessary supplies could not be purchased by the pound or the piecemeal from day to day. This army of employees could not be paid all along the roadway with the setting of every sun. Those who furnished the one were compelled to await the ordinary routine of auditing and settling the account, incident to every business of magnitude, and the employees had to await the arrival of some periodic pay-day. If the officers in charge of this road were under obligation to announce, upon offering to make every purchase and in engaging the services of every such necessary subordinate, that pay for such purchase or labor was to be forfeited at any moment when the bondholders might elect to arrest their administration of the road, it would have been manifestly impracticable to continue the operations of the road with any safety to the public for one single day after the right of the bondholders to take possession of the road had been consummate.

Were they under any such obligation? The contract did not command them to surrender possession to the trustees until required. They had no right of their own election, without the orders of the stockholders who had placed them in charge, to do so. Their duty under the law to the stockholders, and their duty under the contract to the bondholders, required them to retain possession. But if they were under any such obligation, it necessarily involved the impossibility of their continuing to conduct the road, and the unavoidable and immediate suspension of all trade and travel along its track. To say nothing here of the breach of faith to the Commonwealth which conferred the franchise, and the great inconvenience to the public in whose interest the franchise was granted, such a suspension would have necessarily impaired immensely the value of the security of all the bondholders.

It appears from the record of this case that the officers of the Chesapeake and Ohio Railroad Company were placed in this dilemma. There is certainly nothing now before me which requires any censure of their conduct under these embarrassing circumstances. I have only occasion to consider that matter, however, so far it may affect the rights of those who dealt with them under these circumstances as the representatives of all parties interested in the franchises and property.

There can be no difficulty in rejecting any claim upon the funds under control of the court, preferred by any parties who can properly be regarded as creditors at large of the Chesapeake and Ohio Railroad Company, however meritorious the consideration upon which their claims against the said company may be based. Even if there be material furnished by any such creditors now in the daily use of the receiver, if such material were furnished on the credit of the company, any claim on account thereof must, in the absence of any lien retained by the special contract or reserved by the law, be subordinate to the recorded lien of the mortgages.

But can the claims of the employees of the company for arrearages of pay, or the comparatively small class of claimants referred to in the third clause of the receiver's report,[1] be properly regarded

[1] The following is the part of the report referred to :—

"III. There is a class of claims which it is proper that I should bring to the notice of your honor, arising from the purchase of material for the use of the road in the month of September 1875, and the first eight days of October. Much of this material was on hand, at the time that the road was taken out of the hands of the company on the 9th of October, by the order of the Circuit Court of the

in this suit as claims of creditors at large of the Chesapeake and Ohio Railroad Company?

I am not required to consider how these claims should be regarded if this were an application by the claimants to arrest the action of the trustees, or any of them, under the powers granted by their several deeds. This matter presents itself as incidental in the enforcement by a court of equity of the equitable rights of the bondholders under one of the deeds. So far as they are concerned, they have voluntarily subjected themselves to the enforcement of all equitable principles in the administration of the property under control of the court. The beneficiaries under the second mortgage of the Chesapeake and Ohio Railroad Company being subordinate in interest to them, must, I take it, necessarily bear the ill consequences, if any, of the fundamental rule of this court, invoked by the complainants, that he who asks equity must do equity.

I incline to the opinion that the beneficiaries under all the Virginia Central Railroad mortgages, though superior in dignity to those represented by the complainants, are in this suit amenable to the same rule. But it is unnecessary to consider that question. It is conceded on all hands that the claims of these creditors are paramount, and that payment in full of principal and interest will be made to them; and as the allowance of the claims under consideration—confessedly of a high equitable character—can only postpone the realization of their full rights, they must, under familiar principles governing all proceedings of courts of equity, submit to the delay.

I am of opinion that these unpaid employees and other claimants referred to cannot be regarded as creditors at large of the Chesapeake and Ohio Railroad Company. If it can be said that they

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United States for the Eastern District of Virginia; part of it is still on hand amongst the stores of the company; a part of it has been worked up in the repair of engines which are still undergoing repairs, and is not yet in use.

"The purchase of the articles, the subject of these claims, was regarded by those who sold them, and by the officers of the company who bought them, as a cash one, and payment was only delayed by the custom that prevails in mercantile transactions of a like character, of rendering monthly bills for the current month's supplies, and having them paid about the first of each month, instead of demanding cash for each article as it is furnished. These claims would, had not the United States Court taken the road out of the company's hands, all have been paid in the months of October and November, in the regular course of the company's business. They amount to about $17,000. I ask for authority to pay these claims."

extended credit at all, it was credit not to the Chesapeake and Ohio Railroad Company, but to the officers then in charge of its franchises, rights of property, &c. The Chesapeake and Ohio Railroad Company had been then so long in default that the right of the bondholders to claim possession was fully consummate, and this was a matter of common notoriety. It could not be expected that the employees all along the track of this road should pause amidst their unceasing round of daily duty to inquire whether the bondholders had or had not asserted their rights and assumed control. It was enough for them to know that the service they were rendering was such service as any proprietor would necessarily require, and they had a right to believe that the officers left in notorious occupancy of the property, and charged before the public with the responsibility of its care and custody, were abundantly authorized to act for all whom it might concern in contracting for their services.

The same principle will run through all the gradations of employment in this great corporation. These employees of every grade and dignity had every right to believe, that so long as the bondholders stood aloof without asserting their rights to possession, they were willing to accept and regard *pro tanto* as their agents for the preservation and protection of the property, the officers who, placed in charge thereof by their defaulting creditor, could not in good faith to the creditor or the debtor abandon their posts, or be derelict while they held them, to the trusts which they imposed.

These bondholders are now in a court of equity seeking satisfaction of their claims against the railroad company. They have a right to be satisfied to the extent of an entire forfeiture of all the proprietary rights of the company; but to concede to them, in enforcing such forfeiture, a right to repudiate all responsibility to satisfy these highly meritorious claims of employees, &c., out of the property or its future earnings, would be grossly inconsistent with plain equity. In this forum they must be held to be estopped from denying the authority of the officers of the company under the circumstances, as agents for themselves as well as other parties in interest, to have incurred such liability.

A recent decision of the Court of Appeals of Kentucky, in a somewhat similar case, of *Douglas, &c.*, v. *Cline, &c.*, of which I have been furnished by counsel with a newspaper report, fully sustains these views.

It seems to me, therefore, very clear that these claims must be recognised as properly chargeable upon the trust fund. The complainants and the defendants, trustees under the seven per cent. mortgage of the Chesapeake and Ohio Raiload Company, concur with the receiver in advising the payment of these claims. The holders of bonds secured under the mortgages of the Chesapeake and Ohio Railroad Company, all of whom they represent, are the only parties who can be ultimately affected by such payment, and I am happy to have their assent to the entry of an order which, in despite of all their opposition, must have been entered, authorizing and requiring the receiver, as promptly as practicable, to satisfy these claims.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ILLINOIS.[1]
COURT OF APPEALS OF MARYLAND.[2]
SUPREME COURT OF MICHIGAN.[3]
SUPREME COURT OF PENNSYLVANIA.[4]

ATTORNEY.

Parties in Pari Delicto—Different degrees of Guilt as between the Parties to a Fraudulent Transaction—Relation of Attorney and Client existing between Parties in Pari Delicto.—There may be different degrees of guilt as between the parties to a fraudulent or illegal transaction; an l if one party act under circumstances of oppression, imposition, undue influence, or at great disadvantage with the other party concerned, so that it appears that his guilt is subordinate to that of the defendant, the court, in such case, will relieve: *Roman* v. *Mali*, 42 Md.

Where the parties to a fraudulent or illegal transaction are *in pari delicto*, the simple fact, that at the time of such transaction, the relation of client and attorney exists between them, will give the former no claim to the aid of a court of equity to have restored to him the property of which the latter has become possessed by their joint fraud. Such relation alone will not except the case from the general rule, *in pari delicto potior est conditio possidentis, aut defendentis: Id.*

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[1] From Hon. N. L. Freeman, Reporter; to appear in 77 Illinois Reports. The Reporter having determined to publish the latest decisions at once and bring up the others afterwards, there will be a temporary gap from vols. 68 to 76, which will be filled hereafter.

[2] From J. Shaaf Stockett, Esq., Reporter; to appear in 42 Maryland Rep.

[3] From Hoyt Post, Esq., Reporter, and Henry A. Chaney, Esq. Cases decided at January Term 1876. The volume in which they will be reported cannot yet be indicated.

[4] From P. Frazer Smith, Esq., Reporter; to appear in 78 Pa. State Reports.